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BRIEF FOR PETITIONER.

In the Supreme Court of the United States

OCTOBER TERM, 1904.

Office Supreme Court U. S.
FILED
OCT 17 1904
JAMES H. McKENNEY,
Clerk.

W. O. JOHNSON, *Petitioner.*

vs.

SOUTHERN PACIFIC COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

W. L. MAGINNIS,
Attorney for Petitioner.

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STATEMENT OF THE CASE.

Petitioner adopts the statement of the facts in this case as made by the Circuit Judge, deciding the case in the Circuit Court of Appeals except for one clause which he has deemed it necessary to insert, which will be noticed as set in capitals.

This is an action for damages for a personal injury in which the Court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the state of California, and Ogden, in the state of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of the train leaving San Francisco, and ran through to Ogden, where it was ordinarily turned and put into a train going west to San Francisco. On August 5, 1900, the eastbound train was

so late that was not practicable to get the dining car into Ogden in time to place it in the next westbound train, and it was therefore left on a side track at Promontory, in the state of Utah, to be picked up by the westbound train when it arrived. While it was standing on this track the conductor of a freight train which arrived there was directed to take this dining car to a turn-table, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the head brakeman and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. THE TRAIN ON WHICH JOHNSON WAS CAME TO THE STATION FROM THE WEST; THE ENGINE WAS UNCOUPLED, RAN AHEAD TO THE SWITCH, AND WAS LET IN ON THE CUT-OFF TO THE DINING CAR. (Tr. p. 14.) IT WAS UNDERSTOOD BY THE COURT AND JURY THAT JOHNSON WAS ATTEMPTING TO COUPLE THE TENDER OF THE ENGINE TO THE DINING CAR. THE TENDER BEING AT THE BACK OF THE ENGINE WHEN THE ENGINE WAS IN BACKWARD MOTION, IT WAS GOING TOWARD THE TENDER. THERE IS NO DIRECT TESTIMONY THAT JOHNSON WAS TRYING TO COUPLE THE TENDER, BUT ALL THE TESTIMONY POINTS TO THAT FACT. "I FAILED TO MAKE IT THE FIRST TIME, I GAVE THE ENGINEER THE SIGNAL TO SLACK AHEAD AND COME BACK THE SECOND TIME AND I FAILED AGAIN. (Tr. p. 14.) I TOLD HIM EACH TIME TO MOVE BACK. (Tr. p. 18.) HE WAS NOT COMING BACK VERY SWIFT EITHER. (Tr. p. 19.) HE DID NOT

COME BACK UNTIL I SIGNALLED HIM TO COME. BACK. (Tr. p. 11.) Q. HE MOVED BACK AND YOU FAILED TO MAKE THE COUPLING THAT TIME? A. I NEVER MADE IT. (Tr. p. 19.) Q. AND THEN YOU MADE THE SIGNAL FOR HIM TO COME BACK THE SECOND TIME. A. AND AS SOON AS I GAVE THE SIGNAL, ETC. (Tr. p. 19.) Q. YOU THEN SIGNALLED FOR HIM TO MOVE HIS ENGINE OFF AGAIN, SO AS TO ENABLE YOU TO MAKE IT AND YOU THEN SIGNALLED HIM TO COME BACK SO YOU COULD MAKE THE CONNECTION? A. YES, SIR. (Tr. p. 20.) I PUT THE LINK IN THE MILLER HOOK AND THEN ATTEMPTED TO COUPLE ON THE ENGINE AS IT BACKED UP. (Tr. p. 20.) The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler, and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook; but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side, and would not pass over it. Johnson knew this, and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car and tried to make the coupling three times without objection or protest. He failed twice and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

ARGUMENT.

Three points were decided in the Circuit Court of Appeals, each one of which we consider as erroneous. The first was that under the Act of Congress of March 2, 1893, and section 2 of said act, which reads as follows: "That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any CAR used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars") a freight engine was not a car. Second, that the dining car, having been equipped with a Miller hook, which would couple automatically with other Miller hooks, but not with the Janney coupler which was on the engine, and the Janney coupler being automatic if brought into contact with other Janney couplers, but not automatic when brought into contact with the Miller hook, that even though these two would not couple by impact, yet the statute had been complied with. Third, that the dining car, having been set out on the side track at Promontory for the purpose of being picked up and carried on its return trip to California by the westbound train, although in the process of being turned around preparatory to its return journey, was not at that time being used in interstate traffic.

1. As to the first point decided by the court below, a singular condition of affairs seems to exist. It is only another illustration of the fact so well known to lawyers that whilst a witness is upon the stand detailing what happened, a certain state of affairs will be understood from his testimony, by

court, counsel and jury, and yet when the same testimony is reduced to cold print the fact assumed by every person in the trial does not appear, at least plainly to the reader. In this case, as will be seen by the clause interpolated in the statement of facts, the plaintiff Johnson was engaged in coupling an "engine" to a dining car, and it is very material to determine what is meant by the word "engine." We take it for granted that it is a matter of common every-day experience and observation that what the majority of people understand by the word "engine," as used in connection with a train of cars, is what technically would be called the locomotive and tender. In fact, in practical railroading there is no such thing as an "engine" without a tender, as the tender carries the coal and water, without which the locomotive could not run a mile, and never does. So that in considering what was meant in the court below when the witnesses and counsel used the word "engine," we must apply the result of common observation, which is, that reference was made not only to the locomotive, but to the tender. But the tender is only a car, nothing more nor nothing less; it is used for the transportation of coal and water to supply the locomotive. The definition of tender as given in Volume 4, Universal Dictionary of the English Language is: "The carriage which is attached to a locomotive and contains the supply of fuel and water." In this case, although it is nowhere directly said in the testimony in so many words that the Janney coupler referred to was on the back of the tender, yet a fair construction of the testimony shows that that was the part of the engine with which Johnson was dealing. At every place where it is spoken of he uses the expression that "the engine backed up"; he "gave a signal to back up";; "it came back."

When an engine moves with a locomotive in front, the only correct expression is that it moves forward, and not backward; when, on the contrary, the tender is going first, the only correct expression is that it moves backward. It seems singular that this phase of the question should have been overlooked by the learned Circuit Court of Appeals. But if we are correct in our view of it, there can be no possibility of doubt but what the tender, being a car, was within the purview of the Act of Congress.

But even admitting, for the sake of argument, that it was not, we respectfully insist that this Act of Congress is remedial in its nature, as far at least as protecting employes upon the train is concerned, by rendering it unnecessary for them to go between the cars. As was said by Judge Thayer in the court below:

> "In my judgment it is a very technical inter-
> "pretation of the provisions of the act in
> "question, and one which is neither in ac-
> "cord with its spirit nor with the obvious
> "purpose of the law-maker, to say thatCon-
> "gress did not intend to require engines to
> "be equipped with automatic couplers.
> "The statute is remedial in its nature. It
> "was passed for the protection of human
> "life, and there was certainly as much if not
> "a greater need that engines should be
> "equipped to couple automatically as that
> "ordinary cars should be so equipped, since
> "engines have occasion to make couplings
> "more frequently."

Johnson v. S. P. 54 C. C. A. 519. To the same effect see the case of Fleming v. Southern Railway Co., 131 N. C. 46; 42 S. E. 905. And, indeed, if I read correctly, the Circit of Appeals, through Judge

Vandeventer, in C., M. & St. Paul Ry. Co. v. Voelker, 129 Fed. 522, takes the same view of this statute, where he says:

> "Obviously, the purpose of this statute is the "protection of the lives and limbs of men, "and such statutes when the words fairly "permit are so construed as to prevent the "mischief and advance the remedy."

Which opinion was concurred in by the Justice who wrote the opinion in the Circuit Court of Appeals in the Johnson case.

A section of a statute may be penal as to some of its provisions, and not penal as to others. As illustrations of this see Smith v. Townsend, 148 U. S. 497; Taylor v. Gilman, 23 Blatchford, 327; Wall v. Platt, 169 Mass. 398; Stewart v. B. & O. R. R. Co., 168 U. S. 445; Sutherland on Statutory Construction, sections 208, 360; Taylor v. U. S. 3 Howard, 197.

2. The second point decided by the Circit Court of Appeals is, that the dining car, being equipped with a Miller hook, which is automatic, and the tender, being equipped with a Janney coupler, which also is automatic, but which by reason of their peculiar construction will not couple in impact, that the whole duty of the railroad company under the Act of Congress had been complied with. Judge Sanborn says, in his opinion in the court below (page 515):

> "There are several kinds or makes of practi- "cal and efficient couplers. Some of the rail- "road companies use one kind; others have "adopted other kinds. Couplers of each "kind will couple automatically with others "of the same kind or construction. The "same couplers will not couple automatic- "ally with couplers of different construc-

> "tion. Railroad companies engaged in in-
> "terstate commerce are required to haul
> "over their roads cars equipped with all
> "these couplers. They cannot relieve them-
> "selves from this obligation, or renounce
> "this public duty, for the simple reason
> "that their cars or locomotives are not
> "equipped with automatic couplers which
> "will couple with those with which the cars
> "of other roads are provided, and which will
> "couple with equal facility with those of
> "their own."

It seems to us that the reasoning of the learned justice is fallacious in the extreme, and we respectfully insist so. The Act of Congress not only requires that the cars should be equipped with automatic couplers, but adds the significant words, qualifying the general expression, "coupling automatically by impact." If we understand this language it means that the coupler must not only be of a kind known as automatic, but that in its use it must be in such condition as to couple by impact. It would be absurd, and destructive of the law, if the railroad were permitted, after having adopted a certain style of automatic couplers, to make up its trains, either in isolated instances or as a rule, by undertaking to couple together a series of cars which, by reason of being equipped with dieffrent styles of couplers, would not couple by impact, but would require its brakemen to go between the cars to make the couplings. The same principle which requires the railroad company, after once equipping its cars with automatic couplers to keep the same in repair, so that they will actually work automatically, would seem to require that at least in the same train the coupling appliances should couple by impact. Nor will it

do to say that they are obliged to accept cars from other railroads Such a proposition is neither good in law nor in fact, as it occurs every day for one reason or another that railroad companies require goods to be transferred from the cars of other railroads to its own cars before it will undertake to transport them. The adoption by the railroads company of a reasonable regulation fully protects it from the consequences of such action upon its part.

3. The third point decided by the Circuit Court of Appeals is, that the dining car in question, under the circumstances, was not engaged in interstate traffic at the time of the accident. This dining car Del Monte was used between Sacramento, California, and Ogden, Utah, upon the passenger train of the Southern Pacific Company, to feed the passengers, and it seems to have run into Ogden on one train and out on the succeeding westbound train. On the occasion in question, the eastbound train being late could not reach Ogden before the westbound train would start, and for that reason, and for that reason alone, the train dispatcher ordered it set out at Promontory, a small station in Utah west of Ogden—in fact, so small that there was no switch engine there, and no means of repairing cars even in the slightest detail, and certainly no means of replenishing the stock of eatables necessarily carried on such a trip. Whilst it was standing there, still in pursuance of the purpose of using it in what unquestionably would be interstate traffic (Pullman Co. v. Nolan, 22 Fed. 276; Pickard v. Pullman Co., 117 U. S. 34), orders were transmitted by the train dispatcher to the freight crew, of which Johnson was one, to turn this car around, so that the kitchen would be at the rear end of the car, and the odors arising from the cooking would not offend the passengers who would

use the car. Judge Sanborn, in his opinion in the court below, assumes that the car was empty. If by that he means that no person was dining in it at the time, it may be conceded; but that it was empty nowhere appears. It does not appear that the cooks and conductor, the supplies and equipment of the car, were not all in place in the car. In fact, if we are justified in forming any conclusion, it would seem improbable to say the least of it that all of the employes of the company would desert the car at Promontory and take with them the supplies with which it was intended to feed the passengers during the forty-eight hours which were required to make the trip to Sacramento. Our contention is that the car, having once been impressed with the character of being used in interstate traffic, until the completion of its journey or until some act of the railroad company occurred which would affirmatively divest it of such character, it would remain in interstate traffic. How can it be said with any sort of justict that this car had completed its journey? Certainly the station at Promontory was not a terminal, either of the trip of the dining car or of the road. The car never was out of service; it was being used, in the very act of turning it around, in one sense, for its legitimate purpose as a dining car, as much as if it were upon a train and a number of people were eating meals in it. It was a round trip it was making, and it was

No temporary stoppage of interstate traffic, without some act of abandonment, will deprive it of its interstate character. (D. & H. Co. v. Pa., 1 L. R. A. 232.) The test laid down by this court in such cases, as to the termination of the interstate character of the article in question, seems to be indefinite delay.

In the case of Kelly v. Rhoads, 188 U. S. 1, Mr. Justice Brown says:

> "Bearing in mind that the weight of all the "previous cases in this court has been laid "upon the fact of an indefinite delay, await- "ing transportation at the commencement "of the journey, or awaiting sale or delivery "at its termination, the facts in this case fail "completely to bring it within those athor- "ities."

There was no indefinite delay in this case. On the contrary, the delay was definite and for a purpose, and, as we view it, was only part of the trip. As was said by Mr. Justice Thayer, in the court below:

> "I am also of the opinion that within the fair "intent and import of the act the dining car "in question, at the time of the accident, "was being hauled or used in interstate "traffic. The reasoning by which a con- "trary conclusion is reached seems to me "to be altogether too refined and unsatis- "factory to be of any practical value. It "was a car which at the time was employed "in no other service than to furnish meals "to passengers between Ogden and San "Francisco. It had not been taken out of "that service, either for repairs or for any "other use, when the accident occurred, but "was engaged therein to the same extent "as it would have been if it had been hauled "through to Ogden and if the accident had "there occurred while it was being turned "to make the return trip to San Francisco. "The cars composing a train which is regu- "larly employed in interstate traffic ought "to be regarded as used in that traffic while "the train is being made up with a view to

"an immediate departure on an interstate "journey, as well as after the journey has "actually begun."

If this car were to be regarded as an empty car, that fact alone would not affect its interstate character. Malott v. Hood, 66 N. E. 247.

Respectfully submitted,

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